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No. 90-1582

In The
Supreme Court of the United States
October Term, 1990

FROTA OCEANICA BRASILEIRA, S.A.,

Petitioner,

vs.

STARKHEISER DaSILVA MATOS PIRES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER STATEMENT OF FACTS

Pires was employed as a wiper on a "flag of convenience vessel," a bulk carrier which was one of a group of Brazilian, Panamanian and Liberian flag vessels that were being operated in a Unitary bulk cargo service transporting bulk cargo north and south. The ship was owned and controlled by a group of companies including Frota Oceanica, Omnium Transportation (Liberian), Omnium Agencies (New York) all in competition with US flag bulk cargo carrier vessels (Petition for Certiorari A2). He was injured ashore on December 15, 1975 in Galveston, Texas.

The lower trial court ordered an immediate trial on all issues of Maintenance and Cure (Petition, A6-7). The shipowner demanded a jury trial by letter dated May 29, 1987. The immediacy of the maintenance and cure trial was predicated upon the shipowner's abandonment of seaman Pires after 10 months payment of maintenance and a subsequent refusal to continue supporting him while he was fitted and treated for a modern prosthesis in New York at Rusk Institute. The

shipowner's willful, callous and arbitrary act over a 15 year period, relegated seaman Pires to seek his survival, by means of street begging. Simultaneously, he existed by surreptitiously pilfering discarded food from supermarket garbage and other similar sources.

Respondent and his family are residents of New York (Petition A11, 12), and so was the majority owner of the company (EBT, Fernando Frota, March 2, 1988, pp. 38-42). Fernando Frota, now deceased, formerly held controlling common stock interest which is now held by Jose Carlos Fragos Pires who also maintains a permanent residence in New York City (East 63rd Street) (EBT, Jose Calos Fragoso Pires, September 29, 1987, pp. 33-34).

Respondent served his original summons and complaint dated November 17, 1976, on December 2 and 3, 1976.

Respondent moved for partial summary judgment for maintenance and cure.

The Trial Court denied respondent's motion by order dated October 3, 1977 (Respondent's Appendix, Exhibit 1).

This order is improperly identified in petitioner's appendix at Appendix D, p. A-23, as being dated October 20, 1987, ten years later.

This order is improperly identified in the text of the Petition at page 5, last paragraph.

This order was superceded by the August 19, 1986 order of the Supreme Court, affirmed by May 14, 1987 order of the Appellate Division, and the May 26, 1987 Supreme Court order, affirmed as to maintenance and cure by the May 1, 1990 order of the Appellate Division, First Department.

An amended summons and complaint were served on petitioner on October 13, 1980, adding a cause of action for maintenance and cure.

Respondent filed a Note of Issue and Statement of Readiness on May 6, 1986 (Respondent's Appendix, Exhibit 2).

Petitioner's motion to strike the Note of Issue was denied by the Trial Court's memorandum decision and order dated August 19, 1986 (Respondent's Appendix Exhibit 3).

This Order specifically held that the complaint stated a cause of action for maintenance and cure.

Petitioner subsequently entered an order on the Trial Court's decision, on October 10, 1986.

This order was affirmed by the May 14, 1987 order of the Appellate Division, First Department (Respondent's Appendix, Exhibit 4).

Petitioner moved for summary judgment against respondent a second time.

The Trial Court's May 26, 1987 order (Respondent's Appendix Exhibit 5) denied petitioner's motion.

The Trial Court recited its earlier order, entered October 10, 1986, denying petitioner's motion to strike the Note of Issue and again recognized that the complaint stated a cause of action for maintenance and cure.

The Appellate Division, First Department's May 1, 1990 order reversed this order in part (Petition A1-5).

During the maintenance and cure trial, the Trial Court at petitioner's request severed the action for maintenance and cure from its consequential damage action.

The trial justice at the end of the trial of this cause of action, tried from June 22 to July 3, 1987, complied with petitioner's request in accordance with *Gaspard v. Taylor Diving & Salvage Co.*, 649 F.2d 372 (5 Cir. 1981) cert. den. 455 U.S. 907 (1982), and submitted a series of interrogatories to the jury. The eighth specifically asked the jury to determine the threshold question of punitive damages, to which they responded in the affirmative.

> "8. Did the shipowner willfully, callously, or arbitrarily withhold maintenance and cure from the plaintiff?"
>
> A. Yes" [Petition, A-9]

The lower appellate court found Jones Act jurisdiction herein (Petition A2), but dismissed, because it adhered to the Second Circuit decision of *Wheeler v. West India SS Co.*, 103 F.Supp. 631, aff'd 205 F.2d 354, cert. den. 346 U.S. 339 (Petition A3), which conflicts with all the other Circuits of the United States except the Ninth Circuit which is split between two different benches.

All of the other Federal Circuits apply a different standard than the Second Circuit in ruling as to whether a Jones Act

seaman is entitled to bring an action for injuries sustained off the vessel, but these issues are not before this Court at this time.

New York has the major interest in this action, not the United States, because it is interested in preventing shipowners from abandoning their disabled employees to our state welfare system.

THIS COURT SHOULD DECLINE TO ACCEPT THE PETITION FOR CERTIORARI

POINT I

A. THERE ARE NO CONSTITUTIONAL OR STATUTORY ISSUES INVOLVED IN THE PETITION

Petitioner alleges three constitutional and statutory provisions are involved in their Petition:

1. U.S. Constitution, Article III, Section 2 Clause 1, giving the U.S. Supreme Court authority to review all cases of admiralty and maritime jurisdiction;

2. 28 USC 1333, the Savings to Suitors Clause, permitting respondent to commence his action in the state court, rather than the federal court; and

3. Jones Act, 46 USC 688 permitting a seaman who suffers personal injury the right to sue for money damages with right to trial by jury.

None of these constitutional and statutory provisions are at issue in this case.

While this Supreme Court has jurisdiction to review maritime cases, such as this one pursuant to Article III, Section 2, Clause 1, it should decline jurisdiction here for the reasons set forth in the points, *infra*. This constitutional provision is otherwise not in issue, and not invoked elsewhere in the Petition.

There is no issue in this case nor in the Petition, involving the Savings to Suitors Clause. Respondent's lawsuit, including his maintenance and cure action, has been pending for sixteen years in the New York State Supreme Court. Seaman Pires selected the state court as his forum, pursuant to the Savings to Suitors Clause. Petitioner mentions the Savings to Suitors Clause on p. 17 of his petition, to stand for the proposition that

state courts must follow the uniform federal maritime law. While the latter is true, it is a *non sequitur.*

There is no issue in this maintenance and cure case nor in the Petition involving the Jones Act. The May 1, 1990 Appellate Division, First Department order (Petition, A1-5) dismissed respondent's Jones Act action. The Jones Act action is separate and apart from the maintenance and cure cause of action.

Petitioner's statements on p. 13 of his Petition that punitive damages are not recoverable under the Jones Act is irrelevant and immaterial to the maintenance and cure issues in this case which are founded in General Maritime Law.

Petitioner's subsequent statement on p. 13 that the respondent's "claim for consequential damages for failure to provide maintenance and cure is covered by the Jones Act" misstates the law. See *Vaughan v. Atkinson,* 369 U.S. 527 (1962). Petitioner's claim for consequential damages for failure to pay maintenance and cure is part of the damages recoverable for petitioner's willful, callous, and arbitrary refusal to pay maintenance and cure, and does not require Jones Act status as a predicate finding.

As there are no Constitutional or statutory issues involved in the Petition, the Court should decline jurisdiction and dismiss the Petition.

POINT II

PETITIONER'S PETITION IS PREMATURE AND SHOULD NOT BE CONSIDERED BY THIS COURT

Respondent's cause of action for maintenance and cure, which includes the elements of maintenance, care, cure, punitive and consequential damages, including loss of consortium and attorney's fees, was severed at the request of petitioner during the first trial.

Petitioner thereby successfully split one cause of action—"maintenance and cure"—into three causes of action and trials conducted over a period of three years:

1. maintenance and cure;
(June 17-July 2, 1987)

2. punitive and consequential damages
(December 12, 1988-January 27, 1989)

3. attorney's fees
(August 28, 1989)

Petitioner's motion to set aside the jury verdict at the second trial was submitted to the Trial Court on June 13, 1989 and is *sub judice.*

The Trial Court has not issued any decision following the third which was without a jury.

This Supreme Court cannot properly consider any issues raised and arguments made in the Petition at this time due to the pendency of these related proceedings which are integral components of respondent's "maintenance and cure" cause of action.

This Supreme Court should not permit petitioner to split respondent's one cause of action for maintenance and cure, to obtain three separate United States Supreme Court reviews of the same issues of fact and law.

Petitioner's petition is premature and must be denied.

POINT III

THE NEW YORK COURT OF APPEALS ORDER IS NOT A FINAL JUDGMENT, IT DOES NOT FALL WITHIN THE COX BROADCASTING CO. V. COHN EXCEPTIONS, AND IS NOT REVIEWABLE

Petitioner seeks review of two May 1, 1990 Appellate Division, First Department orders (Petition A1-5 and A29-30) alleging they are reviewable under 28 USC Sec. 1257(3) (1961).

28 USC Sec. 1257(a) permits this Supreme Court to review *final* judgments or decrees rendered by the *highest* court of any state.

The Appellate Division, First Department is an intermediate appellate state court.

The two orders dated May 1, 1990 are not final judgments or decrees. See Point II *supra,* and the three subsequent orders:

1. July 26, 1990 Order, Appellate Division, First Department, denying petitioner leave to appeal to the Court of Appeals (Petition, A26);

2. November 27, 1990 Order, New York Court of Appeals, dismissing petitioner's motion for leave to appeal, because it is not a final order (Petition, A25); and

3. January 15, 1991 Order, New York Court of Appeals, denying petitioner's motion to reargue the November 27, 1990 order (Petition, A-24).

Petitioner's Appeal from one other order is being used as a means to collaterally attack the May 1, 1990 orders, and is pending at this time:

4. February 6, 1991 Order, Supreme Court, New York County, denying stay of execution of judgment (Petition A45-48), being separately appealed by Petitioner (Respondent's Appendix, Exhibit 6)

5. March 7, 1991 Order, Appellate Division, First Department, denying Petitioner's motion to stay execution (Respondent's Appendix Exhibit 7)

Petitioner has failed to satisfy the statutory requirements of 28 USC 1257(a) of "highest court" and "finality."

The two orders do not fall within any judicial exceptions to the finality rules set forth in the case of *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975) at p. 447 *et seq.*

1. There are no constitutional or federal statutory questions involved. See Point I *supra.*

2. There are no important "federal questions" under the Uniform General Maritime Law raised by petitioner.

a. Petitioner's Point I

Juries have long awarded lump sums of money for future maintenance and cure for destitute seamen. See Point V, *infra.*

The *Pires* jury awarded future maintenance and cure for a defined, limited period of time based upon medical testimony of Pires' treating doctor from Rusk Institute, New York University Medical School, and petitioner's doctors, Evans and Balensweig.

The "Large size" of the lump sum award was determined by the jury as an issue of fact based upon evidence and testimony at trial. "Large size" awards are not a federal question.

b. Petitioner's Point II

This Court has expressly permitted, allowed and authorized awards for punitive damages for willful failure to pay maintenance and cure. Petitioner correctly cites the case on point, *Vaughan v. Atkinson,* at p. 11.

Any alleged conflict among Circuits or between New York State and the Second Circuit is an issue not ripe for review until a decision is entered on the second trial for punitive damages, and all appeals are exhausted.

This Court's most recent decision of *Pacific Mutual Life Insurance Co. v. Haslip,* 59 LW 4157 (No. 89-1279), March 4, 1991, expressly authorizes awards of punitive damages and resolves any "conflict" created by *Miles v. Apex Marine Corp.,* __U.S.__, 111 S.Ct. 317 (1990).

3. Petitioner gladly paid part of the judgment to adjourn the second trial, during trial proceedings (Respondent's Appendix, Exhibit 8). Petitioner paid the balance of the judgment after a panoply of post-trial motions and appeals (Respondent's Appendix Exhibit 9). The issues raised in the petition, including "Large lump sum award" are moot.

4. No federal issues are involved herein because this is a dispute between a Brazilian seaman, now a resident of New York City, and a "flag of convenience shipowner," a New York City resident until his demise. The law involved was Brazilian Commercial Code Article 560 and International General Maritime Law. Article 560 was recognized by this Court in the *Osceola* 189 U.S. 158 (1903) as the Brazilian version of maintenance and cure. All the issues of fact as to whether Article 560 was still vital and applicable was part of the Trial Court charge and an issue of fact which went to the jury at petitioner's request. The other issues are issues of fact which are set down in the jury interrogatories and their responses, based upon uncontradicted medical testimony. This Court should decline jurisdiction because the controversy is between two citizens of another country, though they both are residents of New York City.

POINT IV

PETITIONER IS ESTOPPED HEREIN FROM SEEKING THE REVIEW OF THE LOWER COURT'S APPLICATION OF BRAZILIAN STATUTES AND LAWS ON MAINTENANCE AND CURE. THIS WAS THE ESSENCE OF THE LOWER COURT TRIAL AND APPEAL

Petitioner seeks jurisdiction of this Court which may be invoked if any federal question of importance is involved. The issues urged by both sides below were the application and identity of Brazilian Statutes which govern and control Brazilian Maintenance and Cure. Essentially this is a disagreement which does not touch upon or affect any issues of national importance.

There was nothing in the above controversy which is of sufficient importance to invoke the jurisdiction of this Court, on the basis of the issues in this present controversy.

The Petition fails to include, identify and explain the appropriate Brazilian statute relied upon by the Trial Court along with the issue involved with that statute, because if he did so this would support respondent's position that there are no issues or matters of federal importance sufficient to invoke this Court's jurisdiction.

Petitioner's failure to include, identify and explain the application and impact of the Brazilian statute constitutes a waiver and estoppel of any claim based on this statute.

Petitioner's failure to include any Brazilian statutes governing maintenance and cure, which they urged at trial (Petition, A9-13) or on appeal (Petition, A4-5; A29-30) constitutes a waiver of their right to seek review in this Court of the Trial Court and appellate court rulings that United States and Brazilian laws governing maintenance and cure are identical (Petition, A4-5).

POINT V

THE LUMP SUM PAYMENT FOR FUTURE MAINTENANCE AND CURE IS BASED ON ARTICLE 560 OF THE BRAZILIAN COMMERCIAL CODE AND WAS AN ISSUE OF FACT DETERMINED BY THE JURY

This decision involves a Brazilian maintenance and cure statute Article 560 of the Brazilian Commercial Code. The *Osceola,* 189 U.S. 158 (1903) determined that this code is similar to our maintenance and cure. The jury factual determination was based upon medical evidence of a defined future need (Petition, A14-15).

None of the above issues touch upon anyone or anything in the United States or are of interest to this Court.

The statute involved was Brazilian, which a jury determined had been violated. The other factual issue, which involved a basis for a future maintenance and cure award were based on the unchallenged medical testimony of all the medical experts.

The defined future period was based on unchallenged medical testimony that seaman Pires requires a new model prostheses each one to two years along with additional medical treatment and care to improve his medical and physical condition so that he is better able to walk and function.

The Trial Court instructed the jury on these issues as follows (R 1640-41 [R refers to Trial Record on Appeal]:

> You have heard that term "bandied about." Maximum cure. It means that point at which no further improvement in the seamen's medical condition can he expect; when he will benefit from any further medical attention. At that point he reaches maximum cure.
>
> ***
>
> (R 1641-42)
>
> So, after all of the medical attention and the operation and the after care has been completed, that seaman reaches the point of maximum cure. Look at him and say, well, sorry, but there is nothing further that medicine can do for you. That's maximum cure.

So, the obligation, to continue providing for medical attention, and when qualified, medical opinion as to the effect that maximum cure has been effected. And that's one of the things that you will have to decide: was maximum cure effected when this plaintiff left the hospital in Galveston on February 28th, 1976, was he at a point where nothing further, no further medical attention would benefit his condition. If not, did there come a later date at which he reached that point, or has he not reached that point now. And will he continue to require further medical attention with respect to his condition as it changes for the rest of his life.

***

(R 1642-1643)

. . . You have a different case here. You're going to have to decide was maximum cure affected at some point in the past or is there more yet to be done.

You have to take into account what the medical testimony is. Dr. Chu has testified that the plaintiff has not reached the point of maximum cure; that maximum cure would require that this plaintiff be able to walk without support and without dragging his foot, and that would take prolonged training, and that during this period he would need changes of prosthesis because the stump changes with use, with age, with weight-bearing, and various other circumstances. So he says, point of maximum cure has not been reached up to now and will continue on into the future.

Dr. Savitsky, psychiatrist, has testified that this plaintiff . . . that further psychiatric counseling would be needed to help to restore him in that he has not reached the point of equilibrium where nothing further could be done for him.

***

(R 1644-1645)

Dr. Burke Evans, who was the treating surgeon who performed the amputation in Galveston, testified that

there were further things that had to be done . . . that the plaintiff would need a new prosthetic device every 18 to 24 months, and that in his opinion, even in 1983, he needed further gait training.

So, you have to examine the medical opinions which have been proffered to you and make a determination as to when, if at all, a point of maximum cure has been reached.

Obviously all of the issues of an award for future maintenance and cure were predicated on Brazilian Article 560 of its Commercial Code, and the issues of fact based upon the medical testimony as to the extent of future curative rehabilitative need.

All of the existing authorities carefully explain that a disabled seaman's future medical and subsistence needs are wholly predicated on the medical testimony. *Holmes v. J. Ray McDermott,* 734 F.2d 1110, 1985 AMC 2024, page 2031, explains:

The standard for determining when maximum cure has been achieved, which demarcates the point at which an employer properly may terminate a seaman's maintenance and cure, has been stated by this court as follows:

"The accepted legal standard holds that maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition.

To the identical effect is the Fifth Circuit decision *Pelotto v. L & N Towning Co.,* 604 F.2d 396, 1981 AMC 1047, which follows a prior line of authorities:

Cure involves the payment of therapeutic, medical, and hospital expenses not otherwise furnished to the seaman, again, until the point of "maximum cure." *Farrell v. United States* (1949), 336 U.S. 511, 1949 AMC 613; *Myles v. Quinn Menhaden Fisheries, Inc.* (5 Cir., 1962).

. . . The accepted legal standard holds that maximum cure is achieved when it appears probable that further treatment will result in no betterment of the seaman's condition. *Far-*

rell v. United States, supra; Brown v. Aggie & Millie, Inc. (5 Cir., 1973), 1973 AMC 2645, 485 F.2d 1293.

Also identical is *Lirette v. K & B. Boat Rentals,* 579 F.2d 968, 1980 AMC 1055, in which the appellate court awarded Maintenance and Cure until plaintiff seaman reached "maximum benefits of medical treatment." This doctrine is imposed when an award is supported by a physician's testimony. Courts have granted future maintenance, including psychiatric treatment, *under a panoply of different conditions.*

> . . . Courts since Calmar have treated this principle largely as a matter of proof. For example, the Supreme Court reversed an order to pay future maintenance for three years when the plaintiff introduced no evidence to justify maintenance for that period. Salem v. U.S. Lines Co., 370 U.S. 31, 1962 AMC 1456 (1962). When the award is supported by physician's testimony, however, courts have granted future maintenance, including: psychiatric treatments, Domeracki v. Gulf Oil Corp., 1965 AMC 1469, 342 F.2d 219 (3 Cir. 1965); maintenance for three months after trial, Keiser v. American President Lines, Inc., 1975 AMC 371, 384 F.Supp. 554 (SDNY 1974); $1,000 for an operation and $8 per day for twelve weeks to recover, Louviere v. Fidelity & Casualty Co., 210 F.Supp. 260 (WD La. 1962). The principle that the employer's duty goes no further than the seaman's need does not prohibit the district court's order in this case. Under this order, once the plaintiff has reached maximum possible cure," the defendant has no further duty to pay him.

The duration of curative maintenance and cure, its synonym, "maximum benefits of medical treatment," can only be determined by the individual and medical treatment needs of each seaman. Each case is unique. This determination can be only a question of fact based upon the medical testimony adduced at the trial.

The jury's award was based on its finding of future maintenance and cure that "maximum benefits of medical treatment" were still to be achieved, over a defined future period (Petition, A-9, A-15, A-16; A-19).

Supportive medical testimony is critical to a jury verdict for maintenance and cure, because only the jury decides the duration of a seaman's maximum benefits of medical treatment. *Vella v. Ford Motor Co.*, 421 U.S. 1, 1975 AMC 563, *Calmar Steamship Corp. Taylor,* 303 U.S. 501 (1938), *Billiot v. Toups Marine,* 465 F.Supp. 1265, 1979 AMC 1966, *Lirette v. K & B Boat Rentals, Inc.*, 579 F.2d 968, 1980 AMC 1055, *Harper v. Zapata Offshore,* 563 F.Supp. 576 (ED La. 1983), *Gaspard v. Taylor Diving, supra, Murphy v. Light,* 257 F.2d 323.

The ultimate determination, the final total damage award must be supported by a medical threshold upon which to determine the future cut-off date, or duration of maintenance and cure.

Pires' factual pattern is unique; there was overwhelming medical testimony which supported a determination of the two disputed issues of fact in Pires' favor, the term and the amount (R 2025; 1994-95; 2001-07).

A translation of the maintenance and cure requirement of maximum benefits is as long as medical science is capable of improving seaman Pires' condition, maximum benefits of medical treatment have not been reached. All of the doctors agreed that such was the case here.

The trial court (R 2002) properly charged the recognized standard of maximum cure, or its synonym "maximum benefits of medical treatment" to the jury.

Petitioner has sought to compel Pires to return persistently and expend a trial court and jury's time in "serial suits" to collect maintenance and cure for the next succeeding 33 years. Petitioner insists that the serial suits be successively brought following seaman Pires' enduring a 15-year period of starvation and medical neglect. Neither seaman Pires nor the State Court Trial System need to be burdened with that repetitive litigation.

In *Charles Brown v. Dravo Corp.*, 157 F.Supp. 265 affirmed on appeal, 258 F.2d 29, a district court judge presiding at a maintenance and cure case without a jury, rendered a judgment awarding maintenance and cure for a term of nine elapsed years and for an indefinite period into the "foreseeable future." His decision, affirmed by the Court of Appeals, directed that lump sum future maintenance be paid to provide for future treatment, when it said:

> In connection therewith, I advert to that rule of law wherein the court is empowered to award such reasonable sums as the circumstances of the case indicate to cover future treatment for a foreseeable future period of time.

The Third Circuit Court of Appeals, affirming the granting of maintenance and cure for a nine-year period, found such an award to be appropriate and also found that a lump sum for future maintenance and cure issues into the "foreseeable future" is accepted practice in maintenance and cure issues. The Circuit Court recognized that even if the foreseeable future period cannot be measured with exactitude, along with the impossibility of guaranteeing the seaman's future existence, nevertheless it supported the lower court's decision.

> . . . The answer to these arguments is that the district court found that respondent was sufficiently apprised of libellant's condition when the suits were filed on March 15, 1948 and that the pending proceedings constituted notice of libellant's continuing need for maintenance and cure.
>
> ***
>
> . . . Farrell vs. United States, 336 U.S. 511, 518, 1949 A.M.C. 613. The duty to provide maintenance and cure thus continues until the time when the maximum cure possible has been effected, and the district court did not award the libellant more than this. We, therefore, find no error in its judgment in this regard.

The duration of maintenance and cure, all authorities agree is a factual determination founded upon medical testimony. Future awards for maintenance and cure are determined by whether the medical testimony supports a claim that further improvements in the seaman's condition can be had by additional treatment. If so, then the seaman has not reached maximum benefits of medical treatment.

In *Edwards v. Statton & Statton Co.*, 215 So.2d 387, a seaman's return to work was insufficient to terminate his right to maintenance and cure because there was medical proof that medical treatment could improve his condition. The court recognized this factor when it said, return to work:

"does not terminate his right to maintenance and cure in whose service he became injured or ill. Permanente S.S. Corp. vs. Martinez, 369 F.2d 297.

. . . and the fact that the plaintiff (Seaman) returned to his regular employment does not bar his recovery (Citations omitted). Plaintiff is entitled to maintenance and cure undiminished by the amount of his earnings on the jobs between certifiction as Fit for Duty by the U.S.P.H.S. and the date of the jury verdict, Vaughan vs. Atkinson, supra. See Pyles v. American T & P. Corp., 372 F.2d 611.

Maintenance is to be paid as long as there are reasonable prospects of substantial cure. *Monroe v. Farrell Lines,* 1965 A.M.C. 2703, the trial court noted at p. 2706:

. . . I am of opinion that maintenance is required as long as there is a reasonable prospect of substantial cure.

Future maintenance depends on the medical condition of the seaman and the impact of modern medicine and rehabilitation. Maritime courts recognize that the maritime doctrine of maintenance and cure which can continue as long as the:

. . . application of modern "methods of rehabilitation under medical supervision, the seaman is returned, as near as may be, to the status of a functional human being." (Citations omitted). See Smith v. Dale Hart, Inc., __F.Supp.__, 1969 AMC 2400 (W.D.La. 1968).

The above trial court recognized the impact of modern medicine and rehabilitation when they discussed the effect of modern medicine on the seaman's orthopedic injuries.

In *Sobosle v. U.S. Steel Corp.*, 359 F.2d 7, the Third Circuit Court of Appeals was confronted by a need to apply the modern medical discipline of psychiatry and its constant qualitative improvements to a seaman suffering for the past 20 years from a mental illness contracted while in the "service of the ship."

Judge Abraham Freedman, writing for the bench, recognized that a shipowner relationship with a seaman is a unique one because he stands in:

> "loco parentis" to him, and that the courts are obligated to recognize "that the conduct of the seaman is viewed with a solicitude much different from the objectivity which prevails in judging transactions between strangers.

and that new medical treatment constantly applied determines the term for future maintenance and cure.

> . . . Because of admiralty's ancient interest in the rights of the seamen who are its wards a shipowner's obligation to supply maintenance and cure may be revived by the subsequent appearance of new means of treatment after it has been discharged by the apparent achievement of maximum cure.

The Third Circuit Court of Appeals adopted the standard, that maintenance and cure should be provided as long as medical testimony supported the position, that the application of medical science might benefit or improve the seaman's condition.

Circuit Judge Freedman's adoption of the district court's holding in *Sobosle v. U.S. Steel* explains how the constant improvements in medical science impact the duration of maximum benefits of medical treatment, because future maintenance and cure is contingent upon the application of modern medical scientific treatment which:

> can provide medical treatment that might or could benefit or improve the condition or ailment now experienced and suffered by the seaman.

The Federal Court of Appeals explained what maximum benefits means in terms of modern medical technological changes:

> . . . It is my conclusion that the functional nervous condition now experienced by the seaman has continued since the date of the adjudication of Judge Clary and has become progressively worse. In addition thereto, I am satisfied that there is treatment known to medical science that might or could benefit or improve the condition and ailment now experienced and suffered by the seaman.

[2] The law is settled that the ship owner is required to furnish medical care and maintenance, including board and lodging, until the disabled person has been cured or the disability has been declared permanent, or until such time when the maximum cure possible has been effected. Farrell v. United States, 336 U.S. 511, 69 S.Ct. 707, 93 L.Ed. 850.

Until such time as the seaman has been afforded such treatment that the medical profession can state that the maximum cure possible has been effected, maintenance and cure must be paid by the shipowner . . . I make this recommendation for the reason that maintenance and cure must continue until every approach reasonably known to medical science is applied in an effort to cure the seaman and if the suggestion is followed, the parties and the court will within a reasonable length of time in the future be able to know the answer to this most unfortunate situation. (Emphasis added).

Esteemed jurist J. Skelly Wright, now in the Court of Appeals for the District of Columbia, presided over a maintenance case *Scott v. Lykes Bros. S.S. Co.*, 152 F.Supp. 104 (ED La. 1957), 1957 A.M.C. 1340. This involved the application of modern medicine as a basis to provide maintenance and cure for a severely injured seaman.

Judge Wright in describing the physical condition of the seaman noted that no medical condition can be declared hopeless as long as the changes wrought by modern medical science can continue to provide opportunity to improve the seaman's condition. Therefore, maintenance and cure can continue side by side to provide vital and viable medical assistance to merchant seamen which is curative. Maintenance and cure as an expansive doctrine attaches itself to modern medicine and will justifiably provide assistance into the "foreseeable future."

This case graphically depicts one man's courageous fight for control of his mental and physical faculties after suffering a disabling brain injury which paralyzed his speech process as well as his left arm and leg, already badly

broken in the accident. By determined and continuous application of modern methods of rehabilitation under supervision, this plaintiff seaman has delivered himself from the life of a gibbering, hopeless, helpless cripple to that of a functional human being, able to speak to walk, to work, and even to contain himself after months of being fitted with an artificial evacuation receptacle.

Judge Wright's decision impacts our own jury's factual determination. Judge Wright made his own factual and legal determination that the duration of maintenance and cure is to be extended as long as medical science instructs us that a seaman's condition can be improved by curative medical means:

> . . . This court holds that maximum cure, as defined by the Supreme Court, is not achieved by the administration of pills and poultices alone, that maximum cure is reached, in the circumstances of this case, when, through the application of modern methods of rehabilitation under medical supervision, the seaman is returned, as near as may be, to the status of a functional human being.

POINT VI

ALL OF THE ISSUES OF MAINTENANCE AND CURE BETWEEN PIRES AND THE M/V FROTALESTE INCLUDING MAXIMUM CURE WERE FIXED BY THE MASTER ON DECEMBER 15, 1975

Pires' term for future maintenance and cure was unique because the duration of the future term for maintenance and cure was fixed by his Captain of the M/V FROTALESTE.

On December 15, 1975 the Captain of the M/V FROTALESTE acting on behalf of his employer made an Oral Maritime Contract in Texas which supported and probably superseded the original maritime contract made as part of the ship's articles of agreement.

The captain of the M/V FROTALESTE bound the shipowner (R 288 1. 24-289 1. 4):

> "I can guarantee you the company will give you the best medical care and treatment in the world for as long as you need until you walk like a man, not like a cripple."

See the language of Judge J. Skelly Wright in *Scott v. Lykes Bros., supra*, defining the level of a seaman's condition in terms of maximum cure, *supra.*

When the Captain offered Pires to provide him with all modern rehabilitation and treatment, so Pires could walk like a man and not like a cripple (R 288-289), he defined his employer's obligation in terms of the duration and quality of all Pires' future maintenance and cure. Pires' acceptance constituted a contract.

Pires' action herein to recover past and future medical care and cure, is founded upon this agreement coinciding with the doctrine of maintenance and cure that originated at the time of Pires' engagement on the vessel.

The Captain of the M/V FROTALESTE's offer to seaman Pires was accepted by seaman Pires but breached almost immediately by Frota Oceanica when they refused to monitor the inadequate treatment at John Sealy Hospital, December 11, 1975 - February 27, 1976 and when they refused to pay for the

rehabilitation and prosthetic treatment at from March, 1976 at Rusk Institute.

Pires explained what transpired in his hospital room on December 15, 1975.

Q. Now, what was the next thing that yo remember? Did the captain come to visit you?

A. Yes.

Q. Well, forgetting the company's lawyer, what did the Captain talk to you about?

After all, he is your boss, what did he do for you?

A. He told me that I had to sign some papers and that the company would be giving the best medical care and treatment in the world.

MR. MCMAHON: Objection

THE COURT: Overruled.

The Captain told him the company would give him the best medical care.

Go ahead.

THE WITNESS: For as long as I could need, and I would walk like a man again, not a cripple, and I said thank you very much, and I accept and appreciate, even though I am being abandoned, but I know the company will do the best for me.

MR. DEMAY: Your Honor, may I have the last answer read back, please.

THE COURT: Read that back.

Q. Tell us, Mr. Pires what the Captain said to you?'A. He said he just came from the company's office there in Galveston; that the ship was abandoning me, but he said by the way, I can guarantee you the company will give you the best medical care in the world and treatment for as long as you need until you walk like a man, not like a cripple."

In Kossick v. United Fruit, 365 U.S. 731, 1961 AMC 833, this Court recognized that a similar "Oral Maritime Contract" originated bacause the shipowner offered to guarantee the quality of treatment provided to seaman Kossick, at United States Public Health Service, in lieu of his submission to treatment by his private physician who demanded payment for same.

Seaman Pires and Frota Oceanica were both parties to this Oral Maritime Contract in which Frota agreed to provide seaman Pires with the best medical treatment in the world. This meant Rusk Institute.

Frota Oceanica never denied that they entered into this Oral Maritime Contract nor did they produce any testimony on trial to refute the making of said contract (R 492-94; 1549-1551; 1789-1795).

Pires' consideration was the fact that he was a seaman on board the M/V FROTALESTE.

POINT VII

THIS ENTIRE PETITION IS PREMATURE AND THEREFORE NON-FINAL BECAUSE ALL OF THE ISSUES OF MAINTENANCE AND CURE ARE NOT BEFORE THIS COURT

On February 21, 1989, Frota moved to set aside the punitive damage portion of the jury's verdict on the ground that such damages are not recoverable under *Vaughan v. Atkinson*, 369 U.S. 527 (1962). Frota's post trial motion has gone undecided for almost two years at this point. As a consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

There is no issue pending with regard to attorney's fees because that issue has not been determined by the Trial Court. Page seven of Petitioner's Brief:

> Thereafter, in January 1989, the parties proceeded to trial on the issue of consequential damages which arose from the alleged failure to pay maintenance and cure. This trial resulted in a jury verdict in plaintiff's favor awarding, inter alia, $24,000,000.00 in punitive damages. On February 21, 1989, Frota moved to set aside the punitive

damage portion of the jury's verdict on the ground that such damages are not recoverable under Vaughn. Frota's post trial motion has gone undecided for almost two years at this point. As consequence, there is no judgment entered as to the quantum of consequential damages, exemplary punitive damages and attorneys' fees in this case, though all of those claims have been fully tried.

The consequential damage issues was severed and became the subject of a second trial (December 12, 1988 - January 27, 1989). All of the maintenance and cure issues involved in two trials should be submitted simultaneously in any petition for certiorari. Therefore, the petition's second point is premature, is not presently before this Court, and it may never be before this Court if the trial judge dismisses it. For all of these reasons this entire application is premature, not final and should be denied on jurisdictional grounds.

The Trial Court has not yet determined any basis for submission to this Court of any issues raised in Point II or Question II. Therefore, this entire point is premature.

The issue, if any, of whether there is any conflict between any of the Federal Circuits is not an issue herein. The petitioner is setting up a "straw man" in which there appears to be some excuse to ask this Court to make a determination. Since no issue exists, this point should be stricken.

Miles v. Apex Marine Corp., -U.S.-, 111 S.Ct. 317 (1990) does not impact this case, since *Pires* only involves maintenance and cure awarded under a Brazilian Statute and International Maritime Law of Maintenance and Cure. *Miles* confines itself to the Jones Act which is not in issue in this *petition*.

New York State Courts are not required to follow the Second Circuit in maritime law. The Second Circuit is only one of eleven circuits, and the New York State Supreme Court may choose to follow any of them, which was done in *Alvez v. American Export Lines*, 46 NY 2d 634 (1979), aff'd 446 U.S. 274 (1979). There New York State adhered to the Fifth and Ninth Circuits decision and discarded the Second Circuit case of *Igneri v. Cie. de Transports Oceaniques*, 323 F.2d 257, cert. den. 376 U.S. 949. Therefore, New York Courts only are required to follow the law of this Court.

POINT VIII

A DETERMINATION WHETHER THE SHIPOWNER WAS WILLFUL, ARBITRARY AND CAPRICIOUS IN ABANDONING SEAMAN PIRES WAS AN ISSUE OF FACT DETERMINED BY A JURY BASED ON OVERWHELMING TESTIMONY

Petitioner complains about the submission of the eighth interrogatory to the jury which invited them to make a determination as to whether the action of the shipowner amounted to conduct which was the threshold for the imposition of punitive damages.

Petitioner made the following fatal trial errors:

1. failure to object to submission of the issue of punitive damages to the jury;
2. failure to object to submission of the issue of punitive damages to the jury (R1670-81); and
3. failure to object to the submission and content of jury interrogatory #8 (R 2025).

All maritime courts recognize that the punitive damage process is a two stage process. The first stage is the threshold determination of shipowner's misconduct. The second is the sum of the damages.

Petitioner's intentional confusion impels this response, in the form of two separate points within this brief. Both are needed to clearly explain petitioner's erroneous impressions and to clarify the fact that the court followed the prescribed procedure on the first stage of the punitive damage issue.

Therefore this first point must focus on petitioner's waiver of its right to appeal from Interrogatory 8 and the punitive damage issue herein.

The next succeeding point is engendered by reason of petitioner's misstatements, oversights, and application of erroneous decisional law to the factual issues of this case.

Petitioner demanded that the maintenance and cure issues be bifurcated into two parts, the first part, maintenance and cure, the second, consequential and punitive damages (R 190-191).

The trial court acceded to petitioner's request shortly before the openings to the jury (R 190-191), and the trial court stated that it would submit the threshold issue of punitive damages as a jury interrogatory at the conclusion of the trial (R 181, 190-194). Petitioner agreed to that procedure and failed to make an objection to the subsequent punitive damage practice.

All maritime authorities agree that a failure of trial counsel to timely object or except to a charge is fatal to an appeal from that issue.

Petitioner appeals from the submission of the following Interrogatory to the jury (R 1694):

> "Question No. 8, did the shipowner willfully, callously or arbitrarily withhold maintenance and cure from the plaintiff?
>
> The jury responded - "YES".

Interrogatory Eight was identical to the one extrapolated directly from *Gaspard v. Taylor Diving & Salvage Co., Inc.*, 649 F.2d 372, 374, that was approved by the Fifth Circuit:

> 13. [W]as [Taylor] willful, arbitrary or unreasonable in its failure to pay Paul J. Gaspard maintenance and cure?
> Answer, Yes
>
> 14. If your answer to Question No. 13 is Yes, what amount do you find plaintiff is entitled to recover as damages from his employer because of its failure to pay maintenance and cure?
> Answer, $296,240

Appellate authorities, when reviewing trial rulings in maritime cases, refuse to review any issue not raised before the trial judge. This is based upon the theory that the trial judge is unable to repair an error if said error was not called to his attention by an objection or an exception during trial.

The First Circuit Court of Appeals in *Valm v. Hercules Fish Products*, 701 F.2d 235, a Jones Act case recognized that a failure of trial counsel to request a directed verdict on unseaworthiness is fatal to any appellate review.

Another First Circuit decision similarly holding is *Hubbard v. Faros Fisheries, Inc.*, 626 F.2d 196 (1 Cir. 1980), which refused to review a Breach of Warranty of Seaworthiness issue

because of the failure of trial counsel to move for a directed verdict.

A more recent decision by an appellate court in *Templemen v. Chris Craft*, 770 F.2d 245, refused to review an issue as to whether the maritime law was properly aplied because petitioner failed to raise that issue in a lower court.

The Second Circuit Court of Appeals reviewed an appeal brought by the widow of a ship captain against the shipowner for the death of her husband.

In *Van Nijenoff v. Bantry Transp.*, 792 F.2d 26, 1986 AMC 2312, the plaintiff failed to object to a special jury interrogatory, and to request another interrogatory on apportionment of damages. This was fatal to her appeal:

> We need not resolve this issue (apportionment of fault), however, because petitioner never asked that the jury make the distinctions she now describes as imperative. Apportionment of damages requires separate findings as to the damage caused by each harm--here, the fall and subsequent failure to secure adequate medical attention. However, the special verdict form to which petitioner consented in no way asked the jury to apportion harm. The jury was asked only to determine damages resulting from 'the accident.'
>
> Nor can we allow petitioner to try the case anew on a theory steadfastly avoided until after the verdict.

The *Van Nijenoff* decision is reflective of the appellate attitude towards trial counsel who fail to raise issues timely, by means of an appropriate objection or exception, to call this to the Court's attention.

Petitioner's trial counsel failed to mention in its petition that it is now seeking to resurrect to this Court an entire issue of punitive damages, when it failed to object to the important jury interrogatory, asking the jury to make the threshold determination, nor did it object to the Trial Court's charge (R 1680 1. 12-17). It cannot now resurrect an entire issue that has been permanently interred by reason of its failure to timely object to the jury interrogatory and the Court's charge (R 1666).

Petitioner seeks to transform this Court into another appellate stage to repair its own errors. This issue is not one of national importance nor can it be one ripe for review after petitioner's earlier act of overlooking this issue on trial.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

KENNETH HELLER
Attorney for Respondent
335 Broadway, Suite 614
New York, New York 10013
(212) 962-6085

EXHIBIT 1 ORDER OF GREENFIELD J. OCTOBER 3, 1977

INDIVIDUAL CALENDAR PART 22

New York Supreme Court
County of New York

S.M. PIRES AND VIRGINIA PIRES, HIS WIFE
-against-
FROTA OCEANICA BRASILEIRA ET AL.

Hon. EDWARD J. GREENFIELD

***

Upon the foregoing papers this motion for partial summary judgment on the cause of action for maintenance and cure is denied. The complaint in this action does not contain a cause of action for maintenance and cure, which is a form of compensation given by the General Maritime Law to a Seaman who calls ill or is injured while in the service of a vessel. *Evans v. Glindberg Rothchild Co.*, 382 F.2d 637. Moreover the moving papers would be insufficient to justify the relief requested even if such a claim were alleged. Plaintiff has failed to set forth any facts to show that defendants are liable for maintenance and cure under United States Law. Plaintiffs' contention that defendants are collaterally estopped from contesting liability, which is based on the denial of a motion to dismiss for failure to state a of motion in another action brought by a different plaintiff against the same defendants, is without merit. The denial of a motion to dismiss for failure to state a cause of action is not determinative of ultimate liability. In any event, that portion of the order inter alia, denying the motion to dismiss relied on by plaintiff has been reversed by the Appellate Division First Department.

Dated: OCT 3 1977

s/ EJG
J.S.C.

PLAINTIFF'S NOTE OF ISSUE AND STATEMENT OF READINESS

Calendar No. 82141
Index No. 23829/76
Supreme Court, New York County, N.Y.

S.M. PIRES and VIRGINIA PIRES, his wife,
Plaintiffs

against

FROTA OCEANICA
BRASILEIRA, S.A.
FERNANDO FROTA
OMNIUM TRANSPORTATION CO.
(Liberian Corp.)
OMNIUM AGENCIES, INC.
JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES d/b/a PORT OF GALVESTON and CITY OF GALVESTON d/b/a PORT OF GALVESTON,
Defendants

NOTICE FOR TRIAL

Trial by jury demanded
Of all issues
Filed by attorney for Plaintiff Pt. 16
Date summons served 10/14/80
Date service completed 10/14/80
Date issue joined 1/7/81

NATURE OF ACTION OR SPECIAL PROCEEDING
Contract—M & C and Associated Claims

Amount demanded $3,000,000.

Preference claimed under
On the ground that Case assigned to Justice Edward J. Greenfield for all purposes by Order of J. Dudley, dated 4/27/77

Insurance carrier(s), if known: 1. Action is part of complex ligation as per Order, 4/27/77 Dudley

Attorney for Plaintiff KENNETH HELLER, Esq., 335 Broadway, New York, New York 10013; Phone No.: (212) 962-6085. Attorneys for Defendants Cichanowicz, Callan & Keane, 80 Broad Street, New York, New York 10004 (From Frota Oceanica - Byrne) Phone No. (212) 344-7042.

Conboy, Hewitt et al, 100 Park Avenue, New York, NY 10017 (from Galveston Wharves to end) Phone 309-1000.

NOTE: Clerk will not accept this note of issue unless accompanied by a certificate of readiness. In a medical malpractice action, the statement of the amount to conform to the requirements of CPLR 3017(e).

FILED, MAY 6, 1986, COUNTY CLERK'S OFFICE, NEW YORK

Plaintiff's Note of Issue and Statement of Readiness

1. All pleadings served.....completed
2. Bill of Particulars served .....completed
3. Physical examinations completed .....completed
4. Medical reports exchanged .....completed
5. Appraisal reports exchanged .....not required
6. Financial disclosure statements in matrimonial cases exchanged.....not required
7. Discovery proceedings now known to be necessary completed .....completed
8. There are no outstanding requests for discovery.
9. There has been a reasonable opportunity to complete the foregoing proceedings.
10. The case is ready for trial.

Dated: April 22, 1986

s/ Kenneth Heller
Signature—type name below

Kenneth Heller, Esq.
Attorney for Plaintiff
Office & P.O. Address
335 Broadway
New York City, N.Y. 10013

State of New York, County of New York ss.:
Oi Ling Chiu being duly sworn, deposes and says; that deponent is not a party to the action, is over 18 years of age and resides at 335 Broadway, New York, N.Y. That on the 22nd day of April, 1986 deponent served the within note of issue and certificate of readiness on Conboy, Hewitt, et al. and Cichanowicz, Callan & Keane attorneys for Defendants—100 Park Ave., NYC, NY herein, at his office at 80 Broad Street, New York, New York 10004 during his absence from said office
(g) by then and there leaving a true copy of the same with

his clerk; partner; person having charge of said office. (h) and said office being closed by depositing a true copy of same, enclosed in a sealed wrapper directed to said attorney(s), in the office letter drop or bar.

Sworn to before me this 22nd
day of April, 1986
Oi Ling Chiu
SUSAN M. SMITH
Notary Public, State of New York
No. 31-3744590
Qualified in Kings County
Commission Expires March 31, 1988

SUPREME COURT - FIRST JUDICIAL DEPARTMENT
JUDICIAL ASSIGNMENTS
Civil Branch

After review of the special circumstances attendant upon the multi-party proceedings below mentioned, and in accordance with procedures to expeditiously resolve all pending and future pre-trial Court, Civil Branch, First Judicial District, pursuant to the authority conferred upon him, does herewith designate the said proceedings to be henceforth known as a "complex litigation case" and does order the following case assignments in New York County:

The pending proceedings entitled *Estate of Famuel Diaz de Souza v. Frota Oceanica Brasileira et al* (Index No. 21754/76, Special Term, Part 1); and, *Estate of Jose Porfirio Barbosa v. Frota Oceanica etc.* (Index No. 22137/76, Special Term, Part I); and, *Estate of Waguih Antoun A. Elbakh v. Frota Oceanica etc.* (Index No. 6672/77, Special Term, Part I); and, *Estate of Pires v. Frota Oceanica etc.* (Index No. 23829/76, Special Term, Part I); wherein all of the several proceedings have been heretofore unassigned, there being no "note of issue" and "statement of readiness" filed, and the said proceedings having remained in the Motion Calendar Part, it is now

ORDERED, that the aforementioned proceedings designated as a "complex litigation case" is herewith assigned for all purposes, together with all pending and future pre-trial applications, to Justice Edward J. Greenfield (Trial Term, Part 22).

It shall be noted by all counsel, that henceforth, upon filing any application with the Court the moving papers shall contain an endorsement in the caption indicating the proceeding has been assigned to Justice Greenfield before whom the motion must be made returnable.

Dated: April 27th, 1977
New York, New York

s/Edward R. Dudley
ASSISTANT ADMINISTRATIVE JUDGE

NOTE OF ISSUE MEMORANDUM
DECISION, J. GREENFIELD,
DATED 8/19/86

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,
Plaintiffs,

-against-

FROTA OCEANICA, BRASILEIRA, S.A. FERNANDO FROTA, OMNIUM TRANSPORTATION CO., (Liberian Corp.), OMNIUM AGENCIES, INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES d/b/a PORT OF GALVESTON and CITY OF GALVESTON d/b/a PORT OF GALVESTON,
Defendants.

Greenfield, J.:

Defendant Frota's motion to strike the case from the calendar and to vacate the note of issue is denied. The issue to be tried is plaintiffs' entitlement to maintenance and cure. By decision of October 3, 1977, this court denied plaintiff's motion for partial summary judgment, but did not grant judgement to defendant on this issue. That left the case with issues of fact to be tried as to maintenance and cure. While the court noted in passing that plaintiff did not allege a cause of action for maintenance and cure, that is not tantamount to a ruling as law of the case. See *Credit Francais* v. *Sociedad Financiera De Comercio*, 138 Misc 2d 564, 575.

Paragraphs 19 and 20 of the amended complaint do, in fact, allege a basis for plaintiffs' claim of maintenance and cure. Whether defendant ship owner is liable for such maintenance and cure is among the issues to be resolved upon trial.

This matter is wholly separate and apart from the claims of liability asserted against the ship and defendant Galveston Wharves, which can be dealt with hereafter.

Dated: August 19, 1986

ORDER, APPELLATE DIVISION, FIRST DEPARTMENT, 5/14/87

New York on May 14, 1987

Present-Hon. Leonard H. Sandler
Sidney H. Asch
E. Leo Milonas
Bentley Kassal
Richard W. Wallach

S.M. Pires and Virginia Pires, his wife,
Plaintiffs-Respondents,
against
Frota Oceanica Brasileria, S.A., Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies, Inc., James Byrne, Galveston Wharves, d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston, d/b/a Port of Galveston,
Defendant-Appellants.

Appeals having been taken to this Court by the defendants Frota Oceanica Brasileira, S. Fernando Frota, Omnium Transportation Co., Omnium Agencies, Inc., and James Byrne, defendants Galveston Wharves, d/b/a Port of Galveston, Board of Trustees of Galveston from an order of the Supreme Court, New York County (Edward Greenfield, J.), entered on October 10, 1986.

and said appeals having been argued by Victor S. Cichanowicz and Joseph F. DeMay, Jr. of counsel for appellants Frota Oceanica Brasileira, S.A., *et al.*, and by Thomas V. McMahon, of counsel for appellants Galveston Wharves, *et al.*, and by Kenneth Heller, of counsel for the respondents, and due deliberation having been had thereon

It is *unanimously* ordered *that* the order so appealed from be and the same is hereby affirmed, without costs and without disbursement

ENTER:

HAROLD J. REYNOLDS
Clerk

SUPREME COURT OF THE STATE OF NEW YORK TRIAL TERM PART 22

at the Courthouse thereof, 60 Centre Street, New York, New York, 10007.

Present: Hon. Edward J. Greenfield

Justice.

S.A. Pires and Virginia Pires

-against-

Frota Oceanica Brasileira, et al

The following papers numbered 1 to.....read on this motion.....

***

Upon the foregoing papers this motion is decided in accordance with accompanying memorandum decision.

Dated MAY 26 1987

s/ EJG
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M. PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

FROTA OCEANICA BRASILEIRA, S.A.; FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.); OMNIUM AGENCIES, INC., JAMES BYRNE, GALVESTON WHARVES d/b/a PORT OF GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES, d/b/a PORT OF GALVESTON and CITY OF GALVESTON,

Defendants.

GREENFIELD, J.

Frota Oceanica Brasileira, Fernando Frota, Omnium Transportation Co., Ominium Agencies, Inc., and James Byrne have moved to dismiss the amended complaint and have asked for summary judgment in favor of the defendants.

This action arises out of injuries sustained by the plaintiff on the waterfront in Galveston, Texas, a short distance from his ship. As a result of being run over in the railroad switching yard adjacent to the ship's dock at night, plaintiff suffered the traumatic amputation of his right leg.

The motion of the defendants is predicated on three grounds: (1) that any claim plaintiff may have can be brought only against his employer, Frota Oceanica Brasileira; (2) that inasmuch as the accident took place on shore, there was no breach of duty owing by the shipowner to the plaintiff; and (3) the owner had no duty of Maintenance and Cure under the circumstances.

I. OWNERSHIP AND CONTROL.

The plaintiff alleges that despite the Brazilian trappings of the vessel on which he was employed, and the fact that his contract of employment was with Frota Oceanica Brasileira, in truth, as in Hellenic Lines Ltd. v. Rhoditis, 398 U.S. 306, the ship may have actually been controlled by an owner or owners in the U.S. The flag of the vessel, the nationalities of the seamen, and the parties to the employment contract are considered only "minor weights" in determining whether one is a Jones Act employer. Id, p.310. The most important factor in determining American ownership are ownership of the stock and the location of the base of operations for the managing and chartering of the vessel. Moncada v. Lemuria Shipping Corp., 491 F 2nd 470 (2d Cir), cert. den. 417 U.S. 947. The question of whether the vessel flew the Brazilian flag merely as a "flag of convenience" or is subject to the Jones Act must be determined by an examination of the underlying facts. See Pandazopoulos v. Universal Cruise Line, 365 F Supp. 208.

Prior to examination of these facts, and complete exploration in discovery proceedings, it would be premature to dismiss the action against individuals or entities who are alleged to have exercised real control. Accordingly, that branch of the motion seeking summary judgment because of lack of ownership is denied, as is the branch of the motion seeking to vacate notices of discovery as to the control exercised by defendants Fernando Frota, Omnium Transportation Co., Omnium Agencies, Inc. and James Byrne.

II. RESPONSIBILITY FOR ACCIDENTS ASHORE

The contention by the defendants that they owe no duty to a seaman employed by them beyond the end of the vessel's gangway (Dangovich v. Isthmian Lines Inc., 218 F. Supp. 235, 237, aff'd 327 F. 2d 355) is an over-simplification. The United States Supreme Court has held in Aguilar v. Standard Oil Co., 318 U.S. 724, that the liability of a ship owner may include accidents occurring between the moored ship and the public streets. It is alledged here that because the plaintiff had sustained burn injuries to his hands when carrying out his duties aboard ship, he was going ashore either to get appropriate medication for his hands, or for proper gloves to protect them,

and that therefore, in disembarking, he was still in the ship's service--that he was not going ashore merely on shore leave for his own pleasure. It is alleged that plaintiff's superiors told him the route to follow from the ship into the city, and may even have accompanied him, without warning him of the proximity of railroad activity. Plaintiff was a stranger to the port, he could not find his way about the unlighted harbor at night and spoke no English. Ugarte v. U.S. Lines Inc., 105 AD 2d 606 (1984) is not to the contrary. Unlike what is alleged here, the plaintiff there had gone on shore leave and had chosen on his own to climb between two railroad boxcars, the dangers of which were open and apparent. Under these circumstances, questions of fact are raised as to the scope of the responsibility of the defendants which preclude summary judgment.

III. MAINTENANCE AND CURE

The owners of a ship have an obligation, wholly separate and apart from liability for unseaworthiness or for shore-based accidents, to provide Maintenance and Cure to seamen injured in the service of the ship. Vaughn v. Atkinson 369 U.S. 527. This obligation is wholly separate and apart from any obligation arising under the Jones Act. The obligation to provide Maintenance and Cure appears to be an obligation of the general maritime law, irrespective of the flag of the vessel. For these reasons, because responsibility for Maintenance and Cure is a separate and distinct issue from questions of negligence and Jones Act responsibility, this court has directed that the Maintenance and Cure aspects of this case be tried prior to the resolution of the other questions raised. This determination has been approved by the Appellate Division, and the court will deal with that issue separately.

On this motion, defendants' application for summary judgment or to vacate or modify the disclosure notices is denied.

Dated: May 26, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 4

S.M.PIRES and VIRGINIA PIRES, his wife,

Plaintiffs,

-against-

FROTA OCEANICA BRASILEIRA, S.A., FERNANDO FROTA, OMNIUM TRANSPORTATION CO. (Liberian Corp.), OMNIUM AGENCIES INC., JAMES BYRNE, GALVESTON, BOARD OF TRUSTEES OF GALVESTON WHARVES and CITY OF GALVESTON d/b/a PORT OF GALVESTON

Defendants.

PLEASE TAKE NOTICE that the above named defendant Frota Oceanica Brasileira, S.A. ("FROTA") hereby appeals to the Appellate Division - First Department from each and every part of an order rendered against it by the Supreme Court, New York County, Trial Term, Part IV, Justice Edward Greenfield on February 5, 1991, and entered in the office of the County Clerk on February 6, 1991, ruling that the money judgment in plaintiff's favor herein dated October 21, 1988 which plaintiff seeks to enforce in the amount of about $1,107,360.97 (the "Judgment") is presently enforceable against FROTA, despite a prior ruling by the Court of Appeals that the Judgment is not a final judgment, and despite FROTA's service of a conditional notice of intention to appeal to the United States Supreme Court from the Judgment and each and every part thereof, and the decision of the Appellate Division dated May 1, 1990 modifying and affirming the Judgment and the decisions of the Court of Appeals dated November 27, 1990 and January 15, 1991, denying FROTA leave to appeal on grounds of lack of

finality in the order appealed form, and from each and every part thereof, in the event it was ruled by a court of competent jurisdiction that the Judgment was presently enforceable despite the Court of Appeals' ruling that it is not a final Judgment.

Dated: New York, New York
February 6, 1991

NOURSE & BOWLES
Attorneys for Defendant
FROTA OCEANICA BRASILEIRA, S.A.

By———————————————
Shaun F. Carroll (SC9898)
One Exchange Plaza
At 55 Broadway - 30th Fl.
New York, N.Y. 10006
(212) 952-6200

By Hand

TO: Kenneth Heller, Esq.
335 Broadway - 6th Fl.
New York, NY 10013

Mr. Thomas McMahon
1, Demers & McManus
55 John Street - 16th Fl.
New York, NY 10038

-AND-

Via Telecopier - 516-294-5387

Ahmuty, Demers & McManus
2000 I.U. Willets Road
Albertson, New York 11507

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, entered on March 7, 1991

Present - Hon. Theodore R. Kupferman, Justice Presiding
Sidney H. Asch
Richard W. Wallach
George Bundy Smith
Isreal Rubin, Justices

S.M. Pires and Virginia Pires, his wife,

Plaintiff-Respondents,

-against-

Frota Oceanica Brasileira S.A.,

Defendant-Appellant,

Eduardo Lopez as Executor for the Estate of Fernando Frota, Omnium Transportation Co. (Liberian Corp.), Omnium Agencies Inc., J. Dixon Byrne as Executor for the Estate of James Byrne; Galveston Wharves d/b/a Port of Galveston, Board of Trustees of Galveston Wharves and City of Galveston d/b/a Port of Galveston,

Defendants.

The above-named defendant-appellant Frota Oceanica Brasileira S.A., in connection with its appeal from an order of the Supreme Court, New York County, entered on February 6, 1991, having moved this Court for a stay of payment of the balance of the money judgment in plaintiffs' favor.

Now, upon reading and filing the papers with respect to said motion, and due deliberation having been had thereon,

It is ordered that said motion be and the same hereby is denied.

ENTER:
Francis X. Galdi
Clerk

37405319

CERTIFIED

FOR $450,000.00

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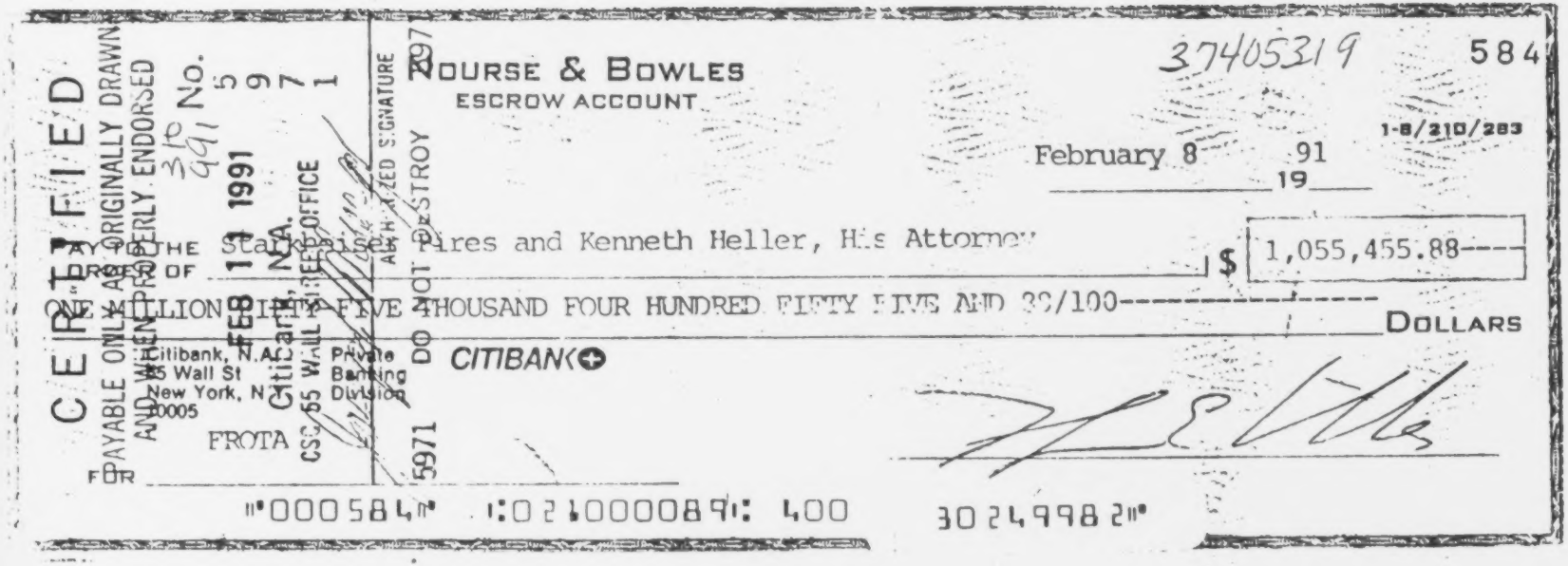
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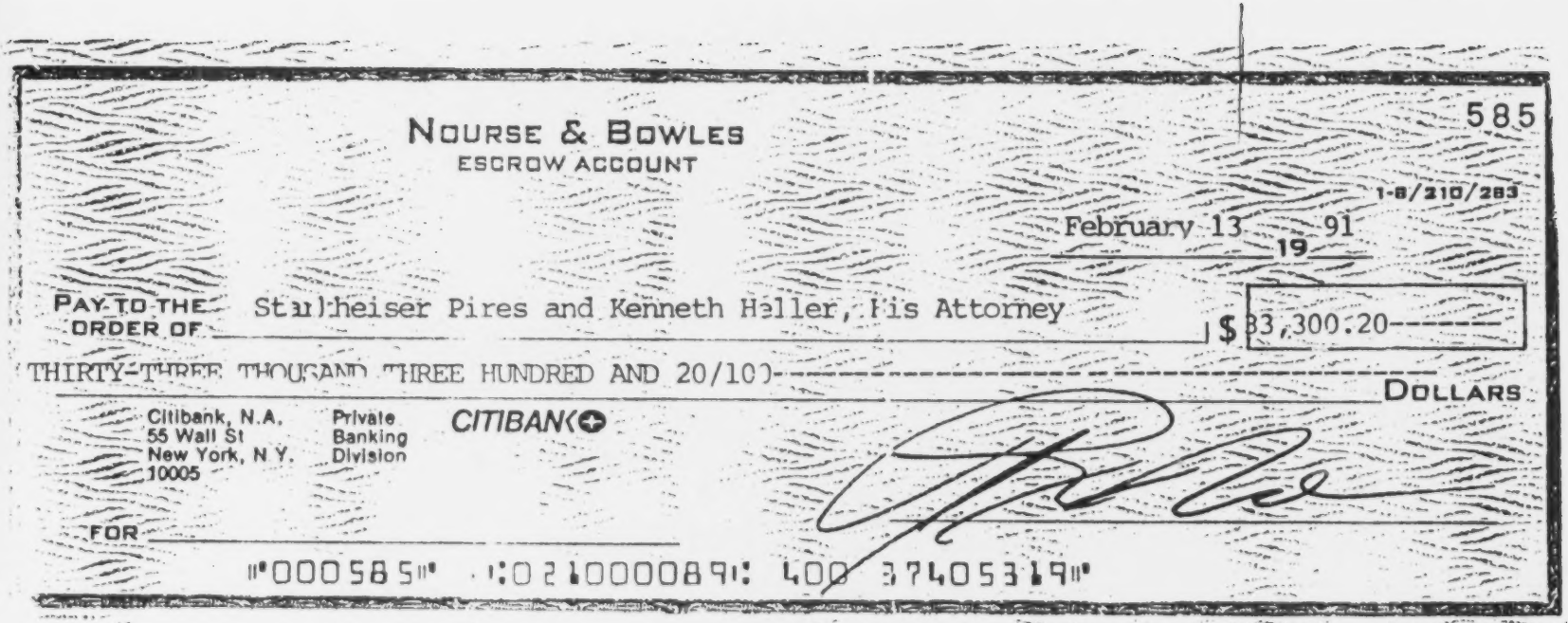
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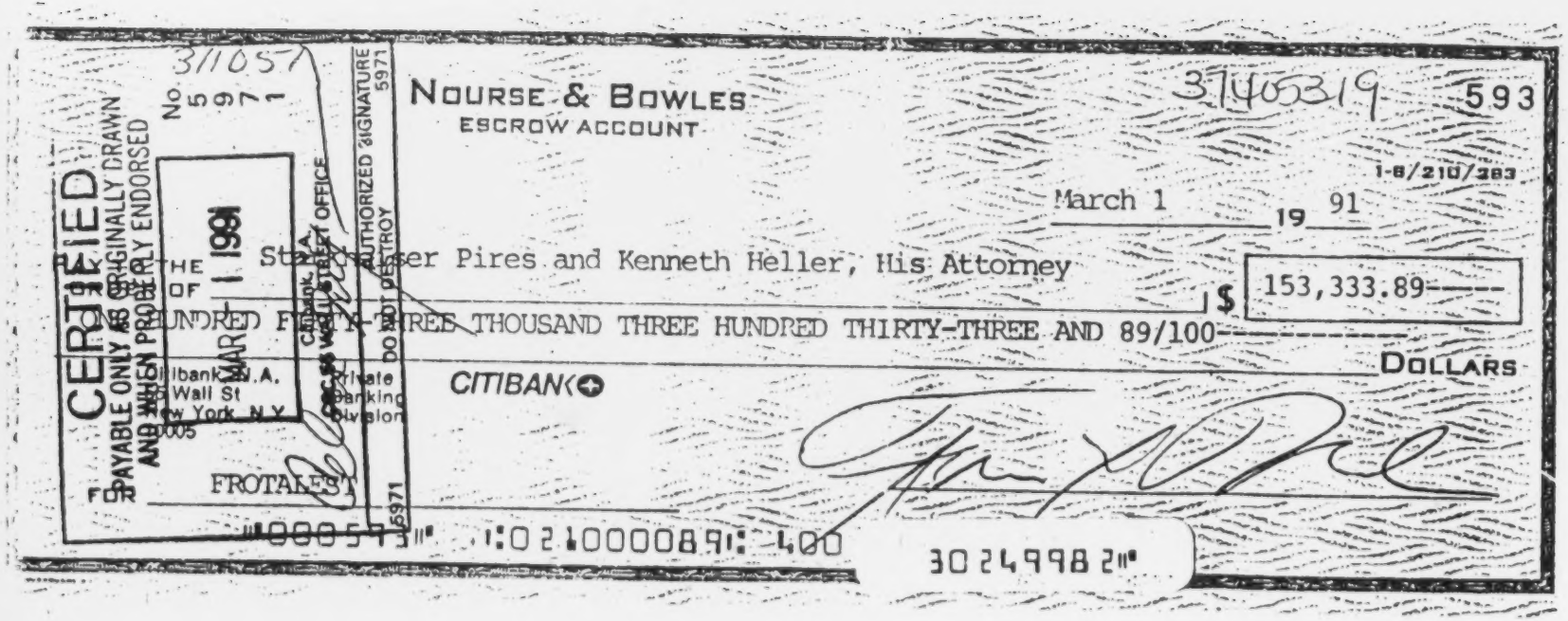
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